RIGHTS STUFF

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Timing of Termination Suspicious

Kevin Loudermilk, an African American man, worked for Best Pallet Company. His job was to disassemble pallets and stack the wood for reuse. He worked by himself on one side of a tear-down machine, where he broke the pallets into pieces and then passed them to others to stack. The company always had two other workers, usually Latinos, working on the other side. His supervisors criticized him for not keeping up and for allowing boards to fall. Loudermilk said that there should be two people working on each side. When he complained about the imbalance to his co-workers, they hurled racial epithets. He complained to management, but nothing was done.

In April of 2006, Loudermilk again complained about the working conditions. He talked about filing a complaint with the EEOC. He took some pictures of the work site so he could show the EEOC how the tear-down machine was set up and why they needed two employees on each side. His supervisor, Dan Lyons, told him to stop taking pictures. He told his supervisor again that he was concerned about how he was treated differently than the Latino employees. Lyons said, "Put it in writing."

The next day, Loudermilk handed Lyons a note. Lyons fired him on the spot. Loudermilk then filed a charge of race discrimination with the EEOC. The EEOC said that Best Pallet probably had engaged in race discrimination. Best Pallet declined to settle the matter, so Lyons took the case to court.

The District Court granted Best Pallet's motion for a summary judgment. The Court said that Loudermilk's only evidence was timing: he handed Lyons a note about racial discrimination and then Lyons fired him. The lower court said that Lyons did not even read the note before firing Loudermilk.

The Court of Appeals disagreed. While it was true that Best Pallet claimed that Lyons had not read the note, Lyons himself said he did read it. And even if he hadn't read it, a jury would be entitled to find that Lyons knew the contents of the note without reading it because of his discussion with Loudermilk the previous day. One day he told Loudermilk to put his complaint in writing and the next day Loudermilk gave him a note. As the Court said, "What did Lyons think was in the note he received the next day? An invitation to a birthday party?"

Best Pallet told the Court it fired Loudermilk not because of the note but because he took pictures at the work site. But it did

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Is Fear Of Heights A Disability?

Darrell Miller began working for the Illinois Department of Transportation (IDOT) in 2002. As a member of the bridge crew, he was responsible for doing a variety of tasks, many of which could be done from the ground, including operating and repairing maintenance vehicles, maintaining large culverts, directing traffic, repairing signs, digging post holes, cleaning headquarters, disposing of trash and keeping records.

From the beginning of Miller's employment with IDOT, he had occasional difficulty working from heights, particularly when he worked in an unsecured environment. He told IDOT and his supervisor that he had a fear of some heights and that there were a few tasks he could not do, including walking a bridge beam. He was able to work in an elevated, hydraulically lifted snooper bucket at heights up to 80 feet and he was able to crawl on the arch of a bridge on a catwalk. He believed his fear affected less than three percent of his job description, and as described below, there was only one time that he did not complete a task as assigned.

The crew routinely took advantage of each member's abilities and accommodated their limitations. One crew member could not weld. Another crew member refused to ride in the snooper bucket and could not spray bridges or mow because of his allergies. Other crew members would swap tasks as needed to get the job done.

In March of 2006, Miller was working with his crew. His supervisor told him to go up in the snooper bucket and nail wood beams to the bridge flanges and then nail plywood sheets to the beams. To do this, he had to unhook his lifeline and work unsecured. He did this, but later filed a grievance, saying he had been ordered to do something unsafe.

Two weeks later, his supervisor told Miller and another crew member to go over the edge of the bridge to change the navigation light bulbs on a bridge that crosses the Mississippi. Miller had to climb down a ladder on the side of the bridge to reach the station that held the light fixtures. For part of the job, he would have to stand on a bridge beam while wearing a life line. He had a panic attack and could not finish the job. He was hospitalized.

IDOT ordered Miller to go on sick leave and to submit to a fitness-for-duty examination. The agency's examiner diagnosed Miller with acrophobia and said he was unfit to continue doing his job. His supervisor told Miller he had to request non-occupational disability or he would "get nothing." He did, and in June, 2006, he was placed on non-occupational disability status.

Miller said his work limitation was an inability to work at heights above 20 to 25 feet in an exposed, extreme position. IDOT treated him as if he were unable to work at any height above 20 feet under any conditions and claimed that 75% of his job involved working on bridge structures.

Miller filed a grievance over the doctor's conclusion that he was unfit to do his job. He also requested an accommodation, asking not to be assigned to work on bridge beams and other extreme places over 20 to 25 feet above ground. He gave IDOT an independent assessment from two other psychiatrists, who said he could continue to do his job if IDOT provided him with the same accommodations he had received before his panic attack. In response, the personnel manager said, "I'll tell you right now. We don't grant requests."

In January of 2007, IDOT formally denied Miller's request for an accommodation. In May of 2007, he was ordered back to work. When he got to work, he saw a female co-worker. He said to a male co-worker, for reasons not explained in the Court decision, "Right there is Arch Enemy Number One. I have never hit a woman. Sometimes I would like to knock her teeth out." IDOT construed this comment as a threat and ordered him to go home. He was fired, but filed a

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Fear Of Heights (continued from page 2)

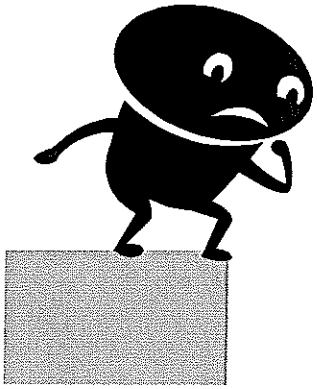
grievance. The arbitrator concluded that he had engaged in "conduct unbecoming," but he was allowed to return to work.

He then sued IDOT under the Americans with Disabilities Act. IDOT won at trial but lost on appeal. The Court of Appeals said that IDOT had regarded Miller as having a disability. Before his panic attack, IDOT allowed Miller to avoid certain tasks and swap duties with co-workers as appropriate. After his panic attack and formal diagnosis, IDOT no longer allowed this, even though two psychiatrists cleared him for work with no significant restrictions. IDOT treated him as though he was unable to perform a wide range of jobs despite the evidence to the contrary.

The Court said that IDOT did not show that being able to work at heights in extreme places was an essential job duty. Someone on the crew had to be able to do this, but not everyone had to be able to do this.

The Court also said there was evidence to believe that IDOT retaliated against Miller when it terminated him for his comment about the co-worker. Another employee who was not regarded as having a disability had threatened violence against his co-workers on more than one occasion, including once when he threatened to kill three co-workers, but was not terminated. Yet Miller was terminated for a much milder comment. And his supervisor's comment that "We don't grant requests" could be seen as a general hostility to requests for accommodation.

The case is Miller v. Illinois Department of Transportation, 2011 WL 1756119 (7th Cir. 2011). If you have questions about your rights and responsibilities under the ADA, please contact the Bloomington Human Rights Commission. ♦



Suspicious Timing (continued from page 1)

not give that explanation to Loudermilk or to the EEOC. It told the EEOC that Loudermilk was let go because of a reduction in force, even though his name was not on a list of workers prepared for that purpose. By the time the matter got to court, Best Pallet abandoned that explanation and instead argued that Loudermilk had resigned, or that his departure was a "mutual decision." The Court of Appeals said that since Loudermilk denied that he had resigned, a jury needed to hear the matter.

The Court said that if Best Pallet fired Loudermilk because he took photos, the company was close to conceding retaliation against him because he was gathering support for a discrimination complaint. Denying him the opportunity to take pictures "looks a lot like an attempt to block the gathering of evidence during an investigation." The Court said that employees don't have the right to break locks and rifle through managers' desk drawers to find evidence of discrimination. But, the Court said, "an employer who advances a fishy reason [for a terminaton]takes the risk that disbelief of the reason will support an inference that it is a pretext for discrimination."

The Court said that given the timing - that Best Pallet fired Loudermilk as soon as he handed his note to his supervisor - "an inference of causation would be reasonable here," and that a jury, not a judge, should decide the matter.

The case is Loudermilk v. Best Pallet Company, LLC, 2011 WL 563765 (7th Cir. 2011). If you have questions about your rights and responsibilities under fair employment laws, please contact the BHRC. ♦

BHRC Says Goodbye To Two Commissioners

Two valued members of the Bloomington Human Rights Commission recently resigned.

Both commissioners, Emily Bowman and Luis Fuentes-Rowher, energetically and effectively helped the commission fulfill its mission, which is "to enforce the Bloomington Human Rights Ordinance in a fair and timely manner, to educate community members about their rights and responsibilities under civil rights laws, to raise awareness on all human rights issues, to ensure that contactors and subcontractors on City jobs pay employees applicable common wages, to ensure that the City, as an employer, governmental entity and provider of public accommodations, complies with the Americans with Disabilities Act, and to educate the community with information about the ADA."

Emily was first appointed to the BHRC by the Bloomington Common Council in 2002. Her accomplishments included working with Jeff Harlig, then the chair of the BHRC, to amend the human rights ordinance to include gender identity as a protected class, serving as the commission's secretary, vice chair and chair, investigating cases and working to educate the public about the BHRC by staffing tables at festivals. Each year she was willing and even eager to march in the Fourth of July parade, handing out BHRC activity books to children along the route. She always recruited friends to help the BHRC distribute additional books.

Emily also worked with a friend to design a terrific new poster for the BHRC, helped judge essays and art entries for the BHRC's annual contest and repeatedly served as a member of the BHRC's team, Rights Stuff, in the Monroe County Public Library's annual VITAL quiz bowl. Emily has accepted an academic position in Cedar Rapids, Iowa.

Luis' tenure with the BHRC was shorter than Emily's but much appreciated as well. Luis, a professor at the Maurer School of Law, was first appointed to the BHRC by Mayor Mark Kruzan in July, 2007. He, too, helped judge essay and art entries, staffed tables, participated in the quiz bowl, marched in the parade and investigated cases. He appeared on ¡Hola Bloomington! to discuss the BHRC, using his bilingual skills to explain our work in Spanish. The BHRC benefited from his knowledge of the law and of the community.

We thank Emily and Luis for their contributions to the BHRC and wish them all the best. ♦